No. 42791-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOHN HYRUM PARKES,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-02282-3
The Honorable Katherine Stolz, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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1. Where the defense merely pointed out one inconsistency in the alleged victim's statement to police, did the trial court's decision to allow the State to introduce, in detail, all of the alleged victim's consistent statements describing each of the

charged crimes deny John Parkes' right to a fair trial?

2. Did the trial court improperly find that the alleged victim's entire statement to investigators was admissible under the rule of completeness where the additional statements were not needed to clarify or explain the portion of the statement introduced by the defense? (Assignment of Error 1, 2, & 3)

3. Did the trial court improperly find that the alleged victim's entire statement to investigators was admissible to rehabilitate her credibility, where the defense made no allegation of recent fabrication and the statement was clearly made at a time when the victim could foresee the legal consequences of her statements? (Assignment of Error 1, 2, & 3).

4. Where a witness, the alleged victim's mother and John Parkes' ex-wife, was peculiarly available to the State but not equally available to the defense, and the circumstances established a reasonable probability that the State would not have knowingly failed to call this witness to corroborate the victim's story unless her testimony would be damaging, did the trial court deny John Parkes' right to present a defense by refusing to give a missing witness instruction and by limiting

Parkes' ability to argue any inference from the State's failure to call this witness? (Assignments of Error 4 & 5)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged John Hyrum Parkes with five counts of first degree child molestation (RCW 9A.44.083) against the same alleged victim, E.T., Parkes' now adult step-daughter. (CP 4-6, 40-42) Over defense objection, the trial court ruled that the State could: admit evidence of Parkes' other sexual acts towards E.T. to show his lustful disposition; present a hearsay statement regarding the alleged molestation made by E.T. to a friend when she was still a child; and call expert witnesses to explain the concept of delayed disclosure of sexual abuse, and to explain that a certain act charged in this case is an infrequent but known sexual practice. (1RP 34-103, 103-12, 114-22)

Also over defense objection, the trial court allowed the prosecution to present hearsay statements that E.T. made to investigators describing the alleged acts of molestation. (3RP 431-39) Parkes subsequently moved for a mistrial, which the trial court denied. (08/29/11 RP 7-11; CP 36-39) The trial court also denied Parkes' request for a missing witness instruction. (4RP 535-43)

The jury convicted Parkes of all but one count. (4Rp 612-14) The trial court imposed a standard range sentence totaling 173 months of confinement. (10/14/11 RP 16; CP 138) This appeal timely follows. (CP 155)

B. SUBSTANTIVE FACTS

E.T.'s parents, Shelly Parkes and David Tullis, separated when she was about two years old. (2RP 168, 169, 170; 3RP 332) E.T. continued to live with David, and visited Shelly most weekends.[1] (2RP 169, 171, 172, 3RP 332-33) David remarried in 1994, when E.T. was about four years old. (2RP 170) Shelly also remarried in 1996, when E.T. was about five years old. (2RP 175) Shelly's new husband, John Parkes, also had children from a prior marriage. (2RP 177)

E.T. testified that John molested her a number of times between the ages of six or seven and 11 or 12. (2RP 181, 186) The first incident that E.T. remembers is one night when John was taking care of her, and he suggested that she keep her underpants off when she changed into her pajamas. (2RP 187) Another time, she recalls that she was asleep on the couch, and awoke when she felt a warm

[1] Several witnesses in this case share a last name. To avoid confusion, they will be referred to by their first names.

substance on her face and in her hair. (2RP 189) John was standing next to her, touching his penis to her face. (2RP 189-90) She tried to tell her mother, but Shelly said it was probably just hair product. (2RP 190)

E.T. testified that another afternoon, while she sat on the living room floor watching television, John came up behind her and placed a vibrator on her vagina. (2RP 191) She was startled and did not say anything. (2RP 193) She did not tell anyone about this incident because she did not want to hurt her mother or family. (2RP 193)

Another time, John called E.T. into his bedroom. According to E.T., John was lying naked on the bed and his penis was erect. (2RP 195-96) John told her to sit on the bed, and he continued to touch his penis as he tried to talk to her. (2RP 196) E.T. also testified that on another occasion, John put her hand over his penis and masturbated. (2RP 199-200) She said he then put semen on her finger and told her to try it. (2RP 199-200)

When E.T. was about nine years old, John came into her bedroom while she slept, and touched his penis to her face and arm. (2RP 200, 204) This happened several times. (2RP 207) Once, according to E.T., Shelly passed by the room and stood in the hallway watching. (2RP 204-05) E.T. said Shelly asked John what

he was doing, and John said he was tucking E.T. into bed. (2RP 205). The next day Shelly asked E.T. about the incident, but E.T. not tell Shelly the truth because Shelly was happy being married to John and E.T. did not want to break up their marriage. (2RP 205)

Another incident occurred when E.T. was about 10 years old. (2RP 208, 218) According to E.T., John took her into the bathroom, took her hand, moved it towards his erect penis, and placed her pinky finger into the opening of his urethra. (2RP 208)

E.T. testified that John looked at pornography, and invited her to look at it with him. (2RP 213-14) She also testified that he once tried to place his hand on her leg when they were driving together in his car. (2RP 210) But all of the touching and inappropriate behavior ended when E.T. was about 12 years old. (2RP 224)

The first person E.T. told was her best friend, Marina Wilson. (2RP 229-30, 231) Wilson testified that E.T. told her that John had touched her breasts and vaginal area, and that she had to touch John's penis. (3RP 368) Wilson did not tell anyone what E.T. had told her because E.T. did not want anyone to know. (3RP 369-70, 371) E.T. also told her friend Gustav St. Andrews that John had molested her. (2RP 232, 237) Andrews testified that he learned of E.T.'s allegations in seventh grade. (3RP 399) Wilson and Andrews

both thought that E.T. seemed uncomfortable around John, and they did not see her interact with him very often. (3RP 365, 401)

E.T. never told her father, but he testified that E.T. often seemed quiet and withdrawn when she returned from weekends visiting Shelly and John. (3RP 342, 344) When David first learned about E.T.'s allegations, he was shocked. (3RP 335) David also testified that E.T. was not eager to report the allegations to the police. (3RP 336)

In 2007, a few years after the last incident, E.T. told her aunt, Kelly Gates, about what John had done. (2RP 235; 08/29/11 RP 37) E.T. did not want Gates to tell anyone, so Gates did not report it to any family members or to the police. (08/29/11 RP 38)

In 2009, Shelly and John separated. (2RP 176-77) The separation was bitter and acrimonious. (2RP 176-77; 4RP 502) In January of 2010, Shelly brought some belongings to E.T.'s new apartment. (2RP 243) One of the items was a photograph of Shelly and John. (2RP 243) E.T. told Shelly that she did not want the photograph in her house. Shelly pressed E.T. to explain why, and E.T. told her mother that John had molested her. (2RP 245-46) Shelly was angry, and eventually reported E.T.'s claims to the police. (2RP 251)

E.T. was upset that her mother did not keep E.T.'s claims to herself. E.T. testified that she did not want to ruin John's life, she did not want to testify at a trial, and just wanted to move forward with her life and put it all behind her. (2RP 250-51)

Pierce County Sheriff's investigator Scott Mielcarek was first assigned to investigate E.T.'s allegations. (3RP 383) He tried to contact E.T., but she was reluctant to discuss the matter. (3RP 383) He thought E.T. may be more comfortable talking to a female investigator, so Detective Theresa Berg took over the case. (3RP 383, 388, 406) Berg met with E.T., and E.T. gave a statement. (3RP 406) But, according to Berg, E.T. was hesitant at first because she was concerned that the allegations would be used as fodder in Shelly and John's divorce proceedings. (3RP 408)

Sex offender treatment provider Robert Parham testified that urethral penetration is a known but unusual sexual practice that some men do for the purpose of sexual stimulation. (2RP 307, 310) Therapist Yolanda Duralde testified that it is common for children to delay telling anyone about sexual abuse for months or even years. (4RP 476) Often the child delays disclosure because they are not in a position of authority, because they like the perpetrator and do not want to get them into trouble, or because they think other people in

their family will be upset. (3RP 476-77)

John's three children, Jessica Jacobsen, Joshua Parkes and Justin Parkes, all testified that they were often at John's home when E.T. was there, and that they played together and got along well. (08/29/11 RP 83-84) None of them ever saw anything inappropriate occur between E.T. and John, and that E.T. did not seem awkward around John. (08/29/11 RP 68, 70, 71, 80-81, 92-93) Several other family members also testified that they never observed any inappropriate behavior on John's part, and that E.T. did not seem uncomfortable around John. (08/29/11 RP 58, 97, 98, 104, 105, 112-13)

John Parkes testified on his own behalf, and denied all of the allegations made by E.T. against him. (4RP 515-17) He denied ever touching E.T. in an inappropriate manner. (4RP 515-17)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT DENIED JOHN'S RIGHT TO A FAIR TRIAL WHEN IT IMPROPERLY ADMITTED PREJUDICIAL PORTIONS OF E.T.'S STATEMENT TO POLICE OVER DEFENSE OBJECTION AND WHEN IT DENIED JOHN'S SUBSEQUENT REQUEST FOR A MISTRIAL.

During cross examination of Detective Berg, John's trial attorney drew attention to one portion of E.T.'s statement where she describes the details of the incident where John ejaculated in her hair

slightly differently than how she described it in her testimony. (3RP 428-29; CP 37) Then, on redirect, the trial court allowed the State to introduce all of the statements E.T. made to Berg detailing each of the alleged incidents of molestation. (3RP 431-39) John's attorney strenuously and repeatedly objected, but the court agreed with the prosecutor's assertion that E.T.'s prior consistent statements were admissible under the "rule of completeness." (3RP 431-39) John later moved for a mistrial, arguing that the prior statements were not admissible under the rule of completeness, were highly prejudicial, and their admission denied John a fair trial. (08/29/11 RP 7-8, 12-13; CP 36-39) The State asserted the statements were admissible under the rule of completeness or to rehabilitate E.T. after the defense attacked her credibility. (08/29/11 RP 8-12) The trial court denied John's motion for mistrial. (08/29/11 RP 13)

A trial court's decision regarding admission of evidence is reviewed for abuse of discretion. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). A trial court's denial of a motion for mistrial is also reviewed for abuse of discretion. State v. Mak, 105 Wn.2d 692, 701, 719, 718 P.2d 407 (1986); State v. Gilcrist, 91 Wn.2d 603, 613, 590 P.2d 809 (1979). An abuse of discretion occurs "when no reasonable judge would have reached the same conclusion." Sofie

v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989). In this case, the trial court abused its discretion when it allowed the state to introduce all of E.T.'s prior consistent statements to Berg, and when it subsequently denied John's motion for mistrial, because the statements were both inadmissible and highly prejudicial.

Under the rule of completeness, if a party introduces a statement, an adverse party may require the party to introduce any other part "which ought in fairness to be considered contemporaneously with it." ER 106; Larry, 108 Wn. App. at 910. However, the judge should only "admit the remaining portions of the statement which are needed to clarify or explain the portion already received." Larry, 108 Wn. App. at 910 (finding that previously redacted portions of defendant's statement were not necessary to clarify the portions that were introduced).

In this case, John's attorney limited his questioning to one specific incident and to whether E.T. described talking to her mother about the incident the next morning. (3RP 428-29) The remainder of E.T.'s statement, where she described every other incident to Berg, was not required to clarify or explain the portion of E.T.'s statement introduced by the defense.

Also, contrary to the State's position below, the additional

portions of E.T.'s statement were not admissible to rehabilitate E.T. after the defense attacked her credibility. (08/29/11 RP 11) It should first be noted that "a defendant's right to impeach a prosecution witness with evidence of bias or a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses." State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998) (citing Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Dickenson, 48 Wn. App. 457, 469, 740 P.2d 312 (1987)). John exercised this right when he cross-examined E.T. and pointed out inconsistencies in her testimony, and when his attorney asked Detective Berg to clarify E.T.'s statement describing one incident.

Furthermore, "[a] mere interrogation of the witness by relevant questions on cross-examination does not justify the admission of prior consistent statements. Nor does a mere contradiction of the witness by other testimony and evidence." K. TEGLAND, 5B WASH. PRAC., EVIDENCE LAW AND PRACTICE § 801.25 (5th ed.) (footnotes omitted).

Rather, a prior consistent statement may only be admitted for the purpose of rehabilitating a witness when: "'(1) [her] testimony has been assailed (2) under circumstances implying recent fabrication of

[her] testimony (3) when the prior out-of-court statements were made under circumstances minimizing the risk that the witness foresaw the legal consequences of [her] statements.'" State v. Pendleton, 8 Wn. App. 573, 574-75, 508 P.2d 179 (1973) (quoting State v. Pitts, 62 Wn.2d 294, 296, 382 P.2d 508 (1963)).

Neither requirements (2) nor (3) were satisfied in this case. There was no suggestion of recent fabrication, and the circumstances of E.T.'s statements (made to a detective during an interview to gather evidence for possible criminal prosecution), certainly do not tend to minimize the risk that E.T. foresaw the legal consequences of her statement.[2] Thus, the additional portions of E.T.'s statement were not admissible to rehabilitate E.T.

There was no proper ground for admitting the other portions of E.T.'s statement, so the trial court clearly abused its discretion when it allowed the State to do so.

The trial court also abused its discretion when it denied John's subsequent motion for mistrial. The trial court should grant a mistrial

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[2] See Pendleton, 8 Wn. App. at 575 (finding admission of prior consistent statements was improper because there had been no suggestion of recent fabrication, and the circumstances of the utterance, which was in the nature of a report by one police officer to another following the commission of a crime, did not tend to minimize the risk that the witness foresaw the legal consequences of his statement).

when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Mak, 105 Wn.2d at 701. There was no evidence or testimony presented in this case that could corroborate E.T.'s version of events. The outcome of this case therefore rested entirely on whether the jury found E.T. credible. The State was able to improperly bolster E.T.'s credibility by introducing her consistent statements to Berg. The State was also able, for a second time, to present to the jury the details of the alleged acts of molestation. (3RP 431-39) The nature of the statements, coupled with the fact that they tended to bolster E.T.'s credibility, was so prejudicial that nothing short of a new trial could have corrected the error and ensured John's right to a fair trial.

The trial court was given numerous opportunities to prevent or correct the error it made in allowing the State to introduce the inadmissible and prejudicial evidence of E.T.'s statements to Berg. This abuse of discretion denied John's right to a fair trial, and requires that his convictions be reversed. *See* Pendleton, 8 Wn. App. at 574 (admission of rebuttal testimony as to out-of-court statements made by the state's chief witness was prejudicial error, requiring a new trial).

B. THE TRIAL COURT DENIED JOHN'S RIGHT TO PRESENT A DEFENSE BY REFUSING TO GIVE A MISSING WITNESS INSTRUCTION REGARDING SHELLY PARKES AND LIMITING JOHN'S ABILITY TO ARGUE ANY INFERENCE FROM THE STATE'S FAILURE TO CALL HER AS A WITNESS FOR THE PROSECUTION.

A defendant in a criminal case has a constitutional right to present a defense and to present his version of the facts. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); Washington v. Texas, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); U.S. Const. amend. VI; Wash. Const. art. 1, § 22. A defendant is also entitled to have the jury fully instructed on the defense theory of the case. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

A missing witness instruction informs the jury that it may infer from a witness's absence at trial that his or her testimony would have been unfavorable to the party who would logically have called that witness. State v. Flora, 160 Wn. App. 549, 556, 249 P.3d 188 (2011); WPIC 5.20. John requested that the court include a missing witness instruction because Shelly Parkes was listed as a witness for the State but was not called, despite evidence that she observed John committing an inappropriate act with E.T. (2RP 205; 4RP 535-38) The defense wanted to be able to argue that the jury could infer that

the State's failure to call Shelly was because she would have contradicted E.T. (4RP 535-38) The trial court denied the request and would not let the defense argue any negative inference for the State's failure to call Shelly as a witness.[3] (4RP 535, 542)

A missing witness instruction is proper where the witness is "peculiarly available" to one of the parties, and the circumstances at trial establish that, as a matter of reasonable probability, the party would not have knowingly failed to call the witness "unless the witness's testimony would be damaging." State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185 (1968) (*overruled on other grounds by* State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012)); Flora, 160 Wn. App. at 556. No inference arises if the witness is equally available to both parties or if the witness's absence can be satisfactorily explained. State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991); Davis, 73 Wn.2d at 276. All of the requirements for a missing witness instruction are met here.

First, Shelly was "peculiarly available" to the State and not equally available to John. For the purposes of the missing witness rule, a witness is not considered *available* to a party merely because

[3] A trial court's refusal to issue a requested instruction is reviewed for an abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

the witness is present in the courtroom or could have been subpoenaed to testify. Blair, 117 Wn.2d at 490; Davis, 73 Wn.2d at 276. Instead, availability turns on the relationship between the party and the witness, and the nature of the testimony that he or she might be expected to give. For a witness to be considered available to a party, "there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging." Davis, 73 Wn.2d at 277.

For example, in Davis, the trial court's failure to give a requested missing witness instruction was found to be reversible error:

> [U]nder the facts of the case at bar, the uncalled witness was not equally available to either party as argued by the state, but rather was 'peculiarly available' to the prosecution[.] The uncalled witness was a member of the same law enforcement agency as the testifying officer. He was the only other witness to the interrogation. The law enforcement agency of which he was a member was responsible for investigating and gathering all the evidence relative to the charges made against [the defendant]. The uncalled witness worked so closely and continually with the county prosecutor's office with respect to this and other criminal cases as to indicate a community of

> interest between the prosecutor and the uncalled witness.

Davis, 73 Wn.2d at 277-78.

In this case, there was a community of interest between Shelly and the prosecution, but none whatsoever between Shelly and the defense. Shelly was the person who finally reported E.T.'s allegations to the police. (2RP 251) Shelly and John were in the midst of an extremely bitter divorce, where allegations of spousal abuse and other misbehavior had been made by both sides. (1RP 13-16; 2RP 177; 4RP 502) There were even individuals reporting that they overheard Shelly saying she was going to hire someone to murder John. (1RP 16) Under these circumstances, it is impossible to see how Shelly would have possibly been "available" to testify on behalf of John, but easy to see how Shelly would have been happy to testify for the prosecution and against John if asked to do so.

Secondly, it is reasonably probable that the State would not have failed to call Shelly unless her testimony would be damaging. E.T. testified that Shelly saw John naked in E.T.'s room one night, and that E.T. went to Shelly after the ejaculation incident and asked her what the substance in her hair was. (2RP 190, 204-05) There was no reason not to call Shelly as a witness, so that she could

confirm that she had seen John acting suspiciously in E.T.'s bedroom and confirm that E.T. had come to her asking what strange substance was in her hair. Unless, of course, Shelly would contradict E.T.'s testimony and create doubt about E.T.'s credibility.

Finally, the trial court found that Shelly's absence from trial could be explained because "[b]oth sides, you know, during argument, were not contesting the fact that to call Shelly Parkes in would be more prejudicial than probative." (4RP 542) This is absolutely incorrect. In fact, during the pretrial motions in limine, John's attorney states:

> I disagree that Shelly Parkes and her relationship is not relevant. I think that there's, indeed, relevance surrounding this because the disclosures made by [E.T.] is the same time frame as the separation. The relationship of Shelly Parkes to [E.T.], or E.T.'s, disclosure occurs during the period of time which this separation occurs between Shelly Parkes and John Parkes. With respect to the specific instances of acts they're referring to, I can't say now as to whether or not they are relevant or not relevant until the testimony comes in because, certainly, [E.T.] talks about making disclosures to her mother, not just in January of 2010 but back, you know, when she was a youngster; and I expect that she will testify regarding that she was giving these signals to her mother or that her mother saw certain things during this period of time of her growing up; so specifically as to whether or not these are relevant or not, I can't tell you at this point in time before the testimony comes in.

(1RP 17) There was no satisfactory explanation for the State's

failure to call Shelly. And the trial court could have easily limited Shelly's testimony to her knowledge of any inappropriate or suspicious behavior during the years that Shelly and John were married, and directed Shelly not to discuss the divorce proceedings that the State believed were irrelevant and unnecessary.

The trial court's failure to give the missing witness instruction was an abuse of discretion, and denied John his constitutional right to present and argue his defense. Because E.T.'s credibility was so central to the outcome of this case, and the evidence of guilt was not overwhelming, the error is not harmless. As in Davis, the trial court's error in refusing the missing witness instruction requires that John's convictions be reversed and his case remanded for a new trial.

V. CONCLUSION

There was no proper basis for admitting the additional portions of E.T.'s statement to Detective Berg, wherein E.T. described all of the remaining alleged acts of molestation. The additional statements were not needed to clarify or explain the portion of the statement introduced by the defense, and so were not admissible under the rule of completeness. Nor were they admissible to rehabilitate E.T., because the defense made no allegation of recent fabrication and the statement was clearly made

at a time when E.T. could foresee the legal consequences of her statements. The trial court abused its discretion when it admitted the statements over defense objection and when it failed to cure the error by denying John's motion for mistrial.

Furthermore, a missing witness instruction should have been given because Shelly Parkes was peculiarly available to the State but not equally available to the defense, and the circumstances established a reasonable probability that the State would not have knowingly failed to call Shelly to corroborate E.T.'s story unless her testimony would be damaging. This error denied John his right to present a defense by limiting his ability to argue his theory of the case to the jury.

All of these errors require that John's convictions be reversed and his case remanded for a new trial.

DATED: September 29, 2014

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for John H. Parkes

CERTIFICATE OF MAILING

I certify that on 09/29/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: John H. Parkes, DOC#352188, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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